



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CAMPAIGN & POLITICAL FINANCE

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MARY F. McTIGUE
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April 25, 1994
AO-94-14

James J. Duane, III, Esq.
Taylor, Anderson & Travers
75 Federal Street
Boston, MA 02110

Re: M.G.L. c. 55, s. 13

Dear Mr. Duane:

This letter is in response to your February 3, 1994 request for an advisory opinion.

You have stated that your client is a candidate for a seat in the Massachusetts House of Representatives. The candidate served as a member of a Massachusetts adjudicatory board from 1986 through May 1993. From 1984 to 1986 and from May 1993 to the present, the candidate served as assistant counsel to the board. The candidate plans to take a leave of absence from the board beginning in May 1994. The primary will be held in September 1994.

You have also stated that the board decided approximately 1,000 of the 15,000 matters filed annually. Each decision was issued by the full board, not by the individual member who heard the case. Some of the decided cases were heard by the candidate, and in such cases, the candidate would write the opinion. In other decided cases, the candidate signed an opinion written by another board member.

In addition to resolving cases, the candidate also participated in hearing and deciding motions during two or three motion sessions each year. Now, as assistant counsel to the board, the candidate is only involved in reviewing approximately 10 matters.

The candidate has indicated that he will not solicit or receive contributions from any of the parties or their attorneys in the cases he is currently involved in. In addition, the candidate will not solicit or receive contributions from lawyers who appeared before him at the board, or from spouses of the persons who appeared before him.¹

¹ You have not asked if M.G.L. c. 55, s. 13 requires your client to take the action you have indicated he will take. Section 13 prohibits solicitation or receipt from any person who "has an interest" in a matter in which the public employee participates in or has participated in or which is the subject of the public employee's official responsibility. Whether these lawyers and the spouses of the persons who previously appeared before your client "have an interest" in a matter which your client participated in, or which is the subject of your client's official responsibility is an issue not addressed in this opinion.

You have asked several questions relating to the interpretation of the second sentence of M.G.L. c. 55, s. 13, which provides, in pertinent part, that

. . . no such gift, payment, contribution, assessment, subscription or promise of money or other thing of value may be solicited or received on behalf [of a person employed for compensation by the commonwealth or a subdivision of the commonwealth] from any person or combination of persons if such person so employed [i.e., your client] knows or has reason to know that the person or combination of persons has an interest in any particular matter in which the person so employed participates or has participated in the course of such employment or which is the subject of his official responsibility. [Emphasis added].

This office has issued several opinions specifically discussing solicitation and receipt allowed under the second sentence of section 13. Most recently, in AO-90-17, the office stated that to the extent a legislative aide's actions affect or have affected a particular constituent specifically, the political committee organized on behalf of the legislative aide would be precluded from soliciting or receiving contributions from that constituent. The office stated that "a constituent would have to have more than a passing interest in a matter in which [the legislative aide] was participating for the prohibition of section 13 to be invoked."

In AO-89-31, the office stated that the Department of Revenue's Chief of the Bureau of Local Assessment could not, even while on leave, solicit or receive contributions from employees he previously supervised. The office also advised that the candidate could not solicit or receive contributions from municipal officials directly involved in projects relating to the Department's distribution of funds to certain cities and towns.

In AO-88-16, the office stated that the committee organized for a candidate who is an Assistant Director of the State Office of Employee Relations could not solicit from labor unions with which the candidate was directly involved or from labor unions affiliated with unions over which the candidate exercised control or oversight responsibility.

In AO-86-10, the office stated that a parole officer could not solicit or receive contributions from any parolee under the candidate's direct supervision, or from any parolee under the supervision of a public employee over whom the candidate had direct authority.

You have asked several questions. Each question will be answered separately.

1. Does the second sentence of M.G.L. c. 55, s. 13 apply to a candidate on a leave of absence?

This office has stated in numerous advisory opinions that if a candidate takes an unpaid leave of absence of at least six months before a general election (or at least four months before a primary election, if any), the candidate would not be subject to the prohibitions of the first sentence of section 13 of M.G.L. c. 55.

The candidate would, however, remain subject to the prohibitions of the second sentence of section 13, even if he takes a leave of absence. See AO-89-31.

The first sentence of section 13, which prohibits solicitation and receipt of contributions by public employees, was designed to avoid the appearance of unfairness in the electoral process. See Anderson v. City of Boston, 376 Mass. 178, 193 (1978). The first sentence of section 13, by its terms, concerns persons "employed for compensation." The purpose of the sentence can be satisfied where a public employee takes a leave of absence, since the person is not so "employed" while on leave.

In contrast, the second sentence of section 13 was intended to protect persons having matters before your client from solicitation, and also to protect your client from being placed in situations where acceptance of contributions might be seen as creating a conflict of interest. The purpose of the second sentence, in contrast to the first sentence, is not satisfied if prohibited solicitation or receipt occurs while a public employee is on a leave of absence. Persons who had matters before your client would reasonably expect that your client would return to the board if not elected, and there would be at least a perception of a continuing "interest" in matters even while on leave.

2. The candidate understands that persons in whose cases he participated cannot contribute to his political committee. However, may persons who had a matter before the board in which he did not participate and which is no longer within his official responsibility contribute to his political committee?

The office has consistently stated that the prohibitions of the second sentence of section 13 apply only where the matter is currently a subject of the person's official responsibility or where the public employee directly participated in a matter of interest to a person who would otherwise be solicited or contribute. Given the facts which you have provided, persons who had a matter before the board are within the class of persons protected by the statute only if the candidate participated in deciding the matter. To prohibit contributions from the parties involved in 14,000 cases filed annually with the board, but not decided, would impose an unnecessarily severe constraint on the candidate's campaign and would not further the goals of the statute.²

² M.G.L. c. 55 does not define "official responsibility," "participate" or "particular matter." These terms are, however, defined in the context of an analogous statute, the state conflict-of-interest law, M.G.L. c. 268A, s. 1. Although the definitions are not controlling here, they do not suggest a different conclusion from that reached in this opinion: "participate" means to participate "personally and substantially;" and "official responsibility" means "the direct administrative or operating authority . . . to approve, disapprove or otherwise direct agency action." See M.G.L. c. 268A, s. 1(j) and (i). Under these definitions, I would conclude that your client did not participate, at least for purposes of c. 55, s. 13, in resolving the 14,000 cases before the board each year, nor would such matters now be the subject of his official responsibility.

3. May other employees and lawyers in the law firm of lawyers who represented parties before the candidate while he was a board member and their spouses contribute to the candidate's political committee?

Section 13 states that solicitation and receipt are prohibited under certain circumstances from "a person or from a combination of persons." "A "combination" is a "union or association of two or more persons for the attainment of some common end. . . as used in [the] criminal context, [combination] means a conspiracy or confederation for unlawful or violent acts." Black's Law Dictionary, 5th Ed., 1979. See also Catrone v. Ogden Suffolk Downs, Inc., 683 F. Supp. 302, 306 (D. Mass., 1988).

Generally, employees and lawyers in a firm of lawyers which represented a party before the board would not have expressly joined with the person bringing a matter before the board for the attainment of any goal. The interest of other lawyers and employees of the firm is too attenuated to bring the other lawyers or employees within a "combination."

Moreover, if the Legislature had intended to prohibit contributions from employees and lawyers in a firm representing a party before the board, it would likely have explicitly said so in the statute. See, e.g., M.G.L. c. 268A, s. 5.³

4. May spouses of lawyers who represented parties before the candidate while he was a board member contribute to his candidate's political committee?

As in the case of attorneys in a firm of lawyers representing a person who has brought a matter before the board, spouses of the lawyers who represented a person should not be considered to be part of a "combination" having an interest in the matter. Their interest in the proceeding is not sufficient to conclude that they were part of a "combination."⁴

Where the Legislature has wished, in the campaign finance law, to restrict a class of persons by family relationship it has explicitly done so in the General Laws. For example, in M.G.L. c. 55, s. 18, the Legislature restricted the distribution of political committees' residual funds on dissolution to certain entities with the limitation that neither the candidate, treasurer or any official of the political committee is "related by consanguinity or affinity" to any trustee, beneficiary or officer of the entity receiving the residual funds. See also M.G.L. c. 268A, ss. 1(e) and 6.

3. There may be facts where solicitation is made to a person other than the individual attorney, or a contribution is received from someone other than the individual attorney, where the other person is merely a conduit for the individual attorney. Your letter does not suggest that such facts exist in your client's case.

4. As with employees or partners of a law firm, there may be facts where solicitation is made to a spouse or a contribution received from a spouse, where the spouse is merely a conduit for the individual attorney. Your letter does not suggest that such facts exist here.

5. May a controlling person of a corporate party whose matter the candidate heard or decided when the candidate was a member of the board contribute to the candidate's political committee? If not, whom does the office define as a controlling person from whom contributions would be prohibited?

In Evans v. Multicon Const. Corp., 30 Mass. App. Ct. 728, further appellate review denied, 410 Mass. 1104 (1991), the court indicated that a person "controlling" a corporation might, in certain circumstances, be subject to the same liabilities as the corporation. See also My Bread Baking Co. v. Cumberland Farms, Inc. 353 Mass. 614 (1968). To impose liabilities of a corporation on the corporation's controlling person, a court would first have to disregard the corporate form and impose liability on "controlling" shareholders or officers, or "pierce the veil" of the corporation.

M.G.L. c. 55, s. 13 prohibits solicitation or receipt from "persons," including corporations, who have "an interest in any particular matter in which the [candidate] participates or has participated in . . . or which is the subject of his official responsibility," (emphasis added). Although some persons who "control" a corporation might not have an interest in a particular matter before an administrative agency in which the candidate participated, a person who "controls" a corporation probably has an interest in such a matter. Therefore, the candidate should not solicit or receive contributions from a person who he knows is the "controlling person" of the corporation, unless (1) the candidate is first satisfied that there are no circumstances which indicate that the person has such an interest, and (2) a court would not "pierce the veil" of the corporation.

In Evans, the court defined twelve factors which should be considered in deciding whether to pierce the veil of a corporation: (1) common ownership; (2) pervasive control; (3) confused intermingling of business activity, assets, or management; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at time of litigated transaction; (9) siphoning away of corporate assets by dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of corporation for transactions of the dominant shareholders; (12) use of corporation in promoting fraud. Id., 30 Mass. App. at 733.

In Evans, four of the factors were sufficient to impose liability on the controlling person. The court stated, however, that the determination is "not one in counting. One examines the twelve factors to form an opinion whether the overall structure and operation misleads." Id., 30 Mass. App. at 736.

Obviously, soliciting or receiving contributions from a person controlling a corporation raises serious questions regarding whether the controlling person, like the corporation, has "an interest" in a matter in which the candidate participated. Therefore, we advise you not to solicit or receive contributions from such persons, except where you are satisfied that there are no circumstances indicating that the person has "an interest" in the matter and the criteria listed in Evans are generally not applicable.

6. Given the "knows or has reason to know" language in the second sentence of M.G.L. c. 55, s. 13, what obligations, if any, does the candidate have to find out who were the controlling persons of those corporate parties whose cases the candidate heard or decided while he was a member of the board?

The words "reason to know" indicate "that the actor has, within his knowledge, facts from which a reasonable person of ordinary prudence and intelligence might infer the existence of a certain fact in question." Fidler v. Eastman Kodak Co., 555 F. Supp. 87, 91-92 (D. Mass. 1982). Section 13 does not impose an obligation to conduct an investigation or "find out" facts regarding the relationship between any person and the corporation which might have appeared before the board.


7. Is there a time period beyond which M.G.L. c. 55, s. 13 does not apply, e.g., three years after a potential contributor's matter was decided while the candidate was a member of the board?

Section 13 does not establish such a time period. As the time elapsed from the decision increases, the candidate may reasonably not recall and may not have "reason to know" that a potential contributor filed a case which the candidate participated in deciding. However, as you have indicated that the candidate has maintained a record of all opinions which he signed, he would know which matters he participated in, and who had an interest in those matters.

This opinion has been rendered solely on the basis of representations made in your letter and in your conversations with office staff as set forth in this letter, and solely in the context of M.G.L. c. 55.⁵

Please do not hesitate to contact this office if you have additional questions.

Very truly yours,


Mary F. McTigue
Director

MFM:GB/cp
cc: Andrew B. Crane, Executive Director
State Ethics Commission

⁵. This office can provide advice only with respect to M.G.L. c. 55. Your questions appear to raise issues relative to M.G.L. c. 268A, the state's conflict-of-interest law. I recommend that your client seek additional guidance from the State Ethics Commission before proceeding further.